NO : 07 - 1444

IN THE
SUPREME COURT OF THE UNITED STATES

SURAIYA MATEEN et al
Petitioners,

VS.

FRANK DICUS
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF GEORGIA

PETITION FOR REHEARING

Suraiya Mateen et al,
Petitioners,
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INTRODUCTION

This is a case wherein the Court of Appeals of Georgia has affirmed the Trial Court's Denial to set aside the Default Judgment entered against petitioners after striking their Answers and their Meritorious Defenses. Thus, there has been violation of the due process clause of the Fourteenth and the Seventh Amendments of the Constitution of the United States.

The Petition for rehearing is supported by the United States Supreme Court's prior decision in ***HOVEY V. ELLIOTT*** , 1767 U.S. 409, 42 L. ed 215, 17 Sup. Ct. Rep. 841.

The United States Supreme Court's attention is hereby drawn towards the above stated citation so as to ensure Rehearing.

The United States Supreme Court, in Hovey v. Elliott has unanimously stated :

"If a party's case has been put out of the Court without due process , then no matter what is the character of his defense, no matter whether he is in contempt or not, a decree against him , depriving him of his fundamental rights is VOID for want of due process. "

Decision of the United States Supreme Court in *Hovey v. Elliott* is the case law which Governs the case at bar.

The Court of Appeals Opinion in this case is in direct conflict with the well established opinion of the US Supreme court and in direct conflict with the opinions of almost all the Circuit Courts.

To provide equal "protection of law", the default judgment should be reversed for further proceedings.

PARTIES TO THE PETITION

The parties in the Court of Appeals are the Parties here:

Suraiya Mateen ,
Roohi Fayaz,
Reem Muhammadi (Petitioners)

Frank Dicus (Respondent)

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Johnson v. Superior Court, 63 Cal. 578 *Baily v. Baily*, *69 iowa*, 77.28 N.W. 443, holding that it

Canon v. Canon, 15 Ga. 405, & *McMakin v. McMakin*, 68 Mo. App.57

PETITION FOR REHEARING
AND
REQUEST FOR SUMMARY DISPOSITION

Pursuant to Rule 44.2, Petitioners respectfully Petition for Rehearing of the Court's Order entered on October 6, 2008 denying Certiorari in this case. Petitioners also respectfully request the Honorable Court for Summary Disposition of this case as the decision of the lower court here, is in direct conflict with the well established opinions of the United States Supreme Court as well as in conflict with the opinions of almost all the Circuit Courts.

BRIEF "RECALL" OF THE CASE

This is a case wherein the Trial Court has Stricken the answers of Petitioners and entered a default judgment against them as a sanction for their inability to timely pay $2000 to Respondent's attorney. The case was then adjudicated on merits against the remaining co defendant, against whom the alleged

allegations were same as the petitioners.

Petitioners filed a Motion in the Trial Court to set aside the erroneously entered default judgment. Motion was denied without a hearing, **Appendix B**.

Petitioners Appealed the Trial Court's "Denial to set aside the default judgment". The Court of Appeals Affirmed the Trial Court Judgment . **Appendix A**.

The Court of Appeals of Georgia's affirmation of the trial court's denial to set aside the default judgment is an Error. The Opinion is in direct conflict with the opinions of almost all the Circuit Courts and with the Opinions of the United States supreme Court in similar situations.

The Court of Appeals affirmation violates the Due Process clause of the Fourteenth Amendment and Seventh Amendment of the Constitution of the United States . The Opinion therefore warrants **Vacation**.

GROUNDS FOR REHEARING

The right to petition for rehearing of an order denying certiorari is not to be deemed an empty formality as though such petitions will as a matter of course be denied.

Petitioners are seeking the Grant of the Petition for Hearing on the Grounds that they are drawing the attention of the Honorable Supreme Court towards a well established prior opinion of the Supreme Court in ***HOVEY V. ELLIOTT*** . This case was not presented by petitioners earlier.

The above case controls the appellate courts in making decisions when the parties are thrown out of the courts without due process.

Grant of Petition for Rehearing is therefore mandatory , so that the Supreme Court can conclude the case at bar in the light of ***HOVEY V. ELLIOTT*** .

Flynn v. United States, 75 S. Ct. 285, 286 (1955).

REASONS FOR THE GRANT OF THE PETITION FOR REHEARING AND SUMMARY DISPOSITION

The Trial Court has Stricken the answers of Petitioners and entered a default judgment against them as a sanction for their inability to timely pay $2000 to Respondent's attorney

The Court of Appeals of Georgia has affirmed the Trial Court Orders denying to set aside the default judgment, Appendix A.

The Opinion of the Court of Appeals in this case is inconsistent with the Prior well established Opinions of the Supreme Court. The following cases are the controlling authority for the decision of Summary Disposition of the case at bar.

1. *HOVEY V. ELLIOTT* , 1767 U.S. 409, 42 L. ed 215, 17 Sup. Ct. Rep. 841. The Supreme Court in this case has unanimously come to conclusion

that a judgment which is entered by striking the answers and testimony of defendants is a nullity and should be vacated.

2. ***FROW V. De La VEGA***, 82 U.S. (15 Wall.) 552, 21 L. Ed. 60 (1872). The Supreme Court here has Unanimously declared that in a case where multiple defendants are jointly involved and if default judgment is entered against few, then the default judgment should be set aside if the case is adjudicated on merits against the remaining defendants.

In accordance with the Supreme Court Rule 44.2, Petitioners have restricted their " Petition for Rehearing" only to *Hovey v. Elliot*, as this case was not presented and was not the basis of her earlier petition.

HOVEY V. ELLIOTT , 1767 U.S. 409, 42 L. ed 215, 17 Sup. Ct. Rep. 841, is a long learned opinion for a unanimous Court reviewing the law under English

and American cases for more than a century, touching the power of Courts to punish the inability of a party to pay money under an order of court.

The united States supreme Court has arrived at the conclusion that a court cannot for this cause strike out an answer and take the bill for confessed;

The United State Supreme Court hold as follows:

" Although the contempt committed by the defendants had been of most flagrant kind, yet it is not in the power of any court to refuse to allow the party to answer or strike his answers from the files, suppress the testimony in his favor and condemn him without consideration thereof and without a hearing on the theory that he has been guilty of a contempt".

The United States supreme Court held such a decree VOID.

SYLLABUS :

It is not within the power of the Supreme Court of the District of Columbia to order the answer of the defendant in a chancery suit pending in that court to be stricken from the files, and a decree to be entered that the bill be taken *pro confesso* against him, simply because he was held to be guilty of contempt in neglecting to pay into court money held by him which was the subject of controversy in the suit, and declined to appear when summoned to do so.

A court possessing plenary power to punish for contempt, limited by statute, has not the right to summon a defendant to answer, and then after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of a contempt of court.

The judicial history of the law concerning contempt of court in England and in this country reviewed and considered.

MR. JUSTICE WHITE delivered the opinion of the Court. The facts out of which this controversy grows are fully stated in *Hovey v. McDonald,* 109 U. S. 150,

In June, 1877, the complainants obtained an order from the Supreme Court of the District of Columbia , requiring the defendants McDonald and White to "pay over to the registry of the court" the sum of $49,297.50. This order was disobeyed, and thereupon the complainants, in September, 1877, moved Court to strike the answers of defendants. On February 12, 1878, the Supreme Court of the District of Columbia at general term made decree as follows:

"The answer of defendants having been removed from the files for their contempt in refusing to obey the order of court and deposit in the registry the sum of

$49,297.50, it is now ordered, adjudged, and decreed that the bill be taken *pro confesso* against them."

This judgment was Appealed:

The Court of Appeals of New York held that the judgment was not binding as it was rendered in a contempt proceeding after striking out the answer and refusing to consider the testimony filed in the cause. The judgment was beyond the jurisdiction of the court, as the power of courts of the District of Columbia to punish for contempt was restricted by the provisions of section 725 of the Revised Statutes. *Hovey v. Elliott,* 145 N.Y. 126.

From this judgment, error was prosecuted to the Supreme Court upon the theory that the decision of the Court of Appeals of the State of New York denied proper faith and credit to the judgment rendered by the Supreme Court of the District of Columbia.

The United States Supreme Court Affirmed the

judgment of the Court of Appeals of New York and stated:

The Question is, whether a court possessing plenary power to punish for contempt, limited by statute, has the right to summon a defendant to answer, and then, after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer, or strike his answers from the files, suppress the testimony in his favor, and condemn him without consideration thereof, and without a hearing, on the theory that he has been guilty of a contempt of court. The mere statement of this proposition would seem, in reason and conscience, to render imperative a negative answer.

In @ 78 U. S. 267):

"In our judgment, the district court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are

unanimous in this conclusion, our opinion will be confined to that subject. The order, in effect, denied the respondent a hearing.

The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice."

And, quoting with approval this language, in *Windsor v. McVeigh*, 93 U. S. 277, the Court, speaking through Mr. Justice Field, again said (pp. 93 U. S. 277-278):

"A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. At common law, no man should be condemned

without being afforded opportunity to be heard.

Lord Lyndhurst, C.B. at 574, said:

"A party has a right to be heard for the purpose of explaining his conduct; he has a right to call witnesses for the purpose of his own defense.

In *Bonaker v. Evans,* 16 Q.B. 162

The court said (p. 171):

" A man cannot incur the loss of liberty or property for an offense by a judicial proceeding until he has had a fair opportunity of answering the charge against him,

"Qui statuit aliquid parte inaudita altera, acquum licet statuerit, haud acquus fuit."

Treatise on the Constitution (vol. 2, § 1789), speaking of the clause in the Fifth Amendment, where it is declared that no person "shall be deprived of life, liberty, or property without due process of law,"

Can it be doubted that due process of law

signifies a right to be heard in one's defense? If the citizens are not given any opportunity to be heard, would it not be violative of the Constitution?

If this be true, as it undoubtedly is, how can it be said that the judicial department -- the source and fountain of justice itself -- has yet the authority to render lawful that which, if done under express legislative sanction, would be violative of the Constitution. If such power obtains, then the judicial department of the government, sitting to uphold and enforce the Constitution, is the only one possessing a power to disregard it. If such authority exists, then, in consequence of their establishment, to compel obedience to law, and to enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent.

In @ 85 U. S. 368):

"It is a rule as old as the law that no one shall be

personally bound until he has had his day in court, by which is meant until he has been duly cited to appear, *and has been afforded an opportunity to be heard.* "

Another consideration which is in force is that we have a statute passed in 1830 to restrain arbitrary action by courts, Code 1899, Chap.147. State v. Hansford. 43 w. Va. 773, 2S S.E. 79.

"Perhaps no definition is more often quoted than that given by Mr. Daniel Webster in the *Dartmouth College Case*." This definition is approved without dissent everywhere.

"By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry, and renders judgments only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society."

If the court had power to strike the answers which are in defense. and deny the defendants of their right to be heard , then it is like the Court has the powers of taking property of one and giving it to another without hearing or without process of law?

If the power to violate the fundamental constitutional safeguards securing property exists, then, Why should not a court in a criminal proceeding deny to the accused all right to be heard on the theory that he is in contempt, and sentence him to the full penalty of the law without due Process?

No distinction between the two cases can be pointed out. The one would be as flagrant a violation of the rights of the citizen as the other; the one as pointedly as the other would convert the judicial department of the government into an engine of oppression, and would make it destroy great constitutional safeguards.

Whether, in the exercise of its power to punish for a contempt, a court would be justified in refusing to permit one in contempt to avail himself of a right guaranteed by statute and constitution.

The right which was here denied by striking the answers and taking the bill for confessed, because of the contempt, involved an essential element of due process of law. This is a theory which could not be admitted without violating the rudimentary conceptions of the fundamental rights of the citizen.

It is therefore clear that the Supreme Court of the District of Columbia did not possess the power to disregard an answer and throw the case out.

It is said by this Court in *Adams v. Postal Telegraph Cable Co.*, 155 U. S. 689, "[t]he substance, and not the shadow, determines the validity of the exercise of the power."

In Windsor v. McVeigh, 93 U.S. 274, 23 l. ed

914, where an answer has been stricken out, the Court has stated " The liability and right are inseparable. A different result would be a blot upon our jurisprudence and civilization.

A sentence of a court pronounced against a party without hearing him , or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."

In Underwood v. McVeigh, 23 Gratt, 409, of a decree given after an answer was stricken out, the court said:

" It lies at the very foundation of justice, that every person who is to be affected by an adjudication should have the opportunity of being heard in defense, both in repelling the allegation of fact, and upon the matter of Law; and no sentence of any court is entitled to least respect in any other court , or elsewhere, when it has been pronounced without opportunity of defense.

If the parties had no day in Court, it is not the Due Process of Law under Federal as well as under State Constitution. It is condemnation of justice.

If a party's case has been put out of the Court without due process , then no matter what is the character of his defense, no matter whether he is in contempt or not, a final decree against him , involving his most important fundamental rights cannot be entered. If erroneously entered , then such an adjudication is void for want of due process.

Refs:

McMakin v. McMakin , 68 Mo. App.57

Larson v. Larson, 9 S.D. 1, 67 N.W. 842

Birsbane v. Brisbane, 34 Hun, 339

Mahoney v. Dwyer, 84 Hun, 348· 32 N.Y. Supp. 346

Following citations support the particular position that a defense cannot be denied to one failing to pay monetary sanction.

Foley v. Foley, 120 Cal.33, 65 Am. St. Rep. 147, 52 Pac. 122, holding that an answer cannot be stricken out. It is the violation of the Due Process clause of the Constitution of the United States:

Gorden v. Gorden, 141 III. 160 , 21 L.R.A. 387, 33 Am. St. Rep. 294, 30 N. E 446.

Johnson v. Superior Court, 63 Cal. 578 , holding that one cannot be denied due process for any reason.

Baily v. Baily, 69 iowa, 77.28 N.W. 443, holding that it would be against public policy to deny a defense for ones protection.

Canon v. Canon, 15 Ga. 405, & *McMakin v. McMakin*, 68 Mo. App.57

The united States Supreme Court thus affirmed the Opinion of the Court of Appeals of New York and stated that the District Court of Columbia lacked power to suppress or strike the answers of defendants.

The United States Supreme Court's opinion in *Hovey*

v. Elliot , 1767 U.S. 409, 42 L. ed 215, 17 Sup. Ct. Rep. 841 has become the case law. This has to be applied to the case at bar.

CONCLUSION

In order to protect the guaranteed fundamental rights of the citizens of the United States in general and the petitioners in particular, and in order to provide equal protection of law , Petitioners respectfully request the Honorable Supreme Court to Grant their Petition for Rehearing and summarily Vacate the Court of Appeals Opinion for want of due process.

Respectfully Submitted this 25th day of October, 2008

Suraiya Mateen

Roohi Fayaz

Reema Muhammed

APPENDIX A

FIRST DIVISION
ANDREWS,P.J.,
PHIPPS AND MIKELL, JJ.

Court of Appeals
of the State of Georgia (Seal) June 27, 2007

IN THE COURT OF ALLEALS OF GEORGIA

A05A1372. MATEEN et al. DICUS MK- 064

MIKELL, Judge,

In Mateen v. Dicus, the Supreme Court reversed Division 1 of our opinion in this case, holding that we erred in concluding that we lack jurisdiction to consider two enumerations of error because appellants Suraiya A. Mateen , Roohi Fatima Faiyaz and Reema Mohammedi

failed to include the relevant orders in their notice of appeal. Accordingly, our prior judgment as to Division 1 is vacated, and the judgment of the Supreme Court is made the judgment of this court. The Supreme Court remanded the case with direction that we consider appellants' remaining enumerations on the merits, We do so below.

1. Appellants complain that the trial court erred in adding a party, defendant Amtul Hameed, through publication. Appellants argue that service by publication was unauthorized because "Plaintiffs were very well aware of the party's address." This argument fails for three

reasons. First, Hameed is not a party to this appeal, and appellants have no standing to voice a vicarious objection to the sufficiency of service upon another party.

Second, appellants waived the argument by failing to assert it in the trial court. The record reveals that at a motions hearing, the court asked defendant Mateen, "are you here to argue defendant Hameed's motion for..... insufficiency of service of process? Mateen replied "No". The court stated "Hameed is not [here]. As far as you know, she's in India." Mateen replied "Yes Sir". It is well established that "one cannot complain of a judgment ,

order, or ruling that his own procedure or conduct procured or aided in causing. Appellants have waived any right to complain of the method of service upon Hameed.

Third, appellee Dicus complied with OCGA § 9-11-4(f)(1)(A) in obtaining the order for service by publication. He submitted as affidavit averring that he believed that Hameed resided in India but that he did not know where she could be found. Pursuant to the statute, the trial court may grant an order permitting service by publiction if, among other things, the affidavit is proper. In this case , appellants offered no evidence to contradict the

affidavit. Thus , the trial court did not err in ordering service by publication upon Hameed.

2. Appellant contend that the trial court erred in refusing to set aside the default judgment entered against them because Dicus's voluntary dismissal with prejudice of defendant John Walrath rendered the default judgment void. Walrath was the attorney who prepared the documents transferring the properties that were the subject of the fraudulent conveyance action. Appellants' contention that a voluntary dismissal with prejudice of an alleged joint tortfeasor renders void the judgment entered against the remaining defendants is not

supported by Georgia law. "A voluntary dismissal with prejudice constitutes a final disposition of the underlying action only as far as the parties involved in the voluntary dismisssal are concerned.... The effect of a voluntary dismissal does not extend to any party not named therein. Furthermore, pursuant to OCGA § 9-11-54(b), an order " which adjudicate fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties," In the case at bar, the dismissal with prejudice adjudicated the liabilities of only one party. It neither

terminated the action nor rendered the default judgment void. The Trial Court did not err in refusing to set aside the default judgment.

3. All pending motions filed by appellants are denied.

Judgment affirmed. Andrews, P.J. and Phipps,J., concur.

Footnotes:

1. 281 Ga.455(637 SE 2d 377) (2006)
2. Mateen v. Dicus, 275 Ga.App.742,743-744(1) (621 SE2d 487) (2005)

3. 281 Ga at 457. The remainder of our rulings were left undisturbed, and our prior decision is reversed only insofar as it is inconsistent with the Supreme Court's decision.

4. Phillips v. Phillips, 159 Ga. App. 676, 677 (2)(285 SE2d 52) (1981). Accord, Ueal v. AAA Partners in adoption, 269 Ga. App. 258, 260 (2)(603 SE2d 672)(2004)

5. (Citations and punctuations omitted.) Parlato v. City of Atlanta, 151. Ga. App. 235, 237 (259 SE2d 217)(1079).

6. Headquarter v, Merrill Lynch, Pierce, Fenner & Smith, 272 Ga. 209, 211-212(2) (528 SE2d 508) (200) (voluntary dismissal of employee does not bar vicarious liability of employer for employee's tortious acts unless dismissal is statutorily described as an adjudication on the merits).

7. See Tanaka v. Pecqueur, 28 Ga. App. 380, 383(5) (601 SE2d 830)(2004)

APPENDIX B Record Page Nos: 3737-3738

IN THE SUPERIOR COURT OF GWINNETT COUNTY

STATE OF GEORGIA

FRANK DICUS
Plaintiff

vs.

MOHAMMAD A, Faiyaz
SURAIYA A. MATEEN
ROOHI FATIMA FAIYAZ
REEMA MOHAMMEDI
JOHN G. WALRATH and
AMTUL HAMEED
Defendants

CIVIL ACTION
FILE NO. 98-A-2162-7

ORDER

Defendant Mateen filed her Motion to Set Aside Default Judgment on October 21, 2003. This Court has previously considered this issue, and this defendant presents no new evidence for the Court's consideration.

It is clear from the record that Defendant was

present at the February 7, 2001 hearing on Plaintiff's Motion for Sanctions, based on defendant's non -compliance with the Court's Order imposing sanctions in connection with compelling depositions, which resulted in the striking of Defendants Answer and entry of a Default Judgment against her on February 12, 2001. This Defendant has made the same allegation of fraud prior to and since then in various different fashions. As such, the Motion is HEREBY DENIED.

This case is on the Court's November 10, 2003 Jury Trial calendar for a trial on damages, and all interested parties should be present and prepared to proceed upon being called in by the Court.

SO ORDERED, THIS 5TH of November, 2003.

/Sd/

MELODIE SNELL CONNNER, Judge
Superior Court of Gwinnett County